

**Letter of Findings: 04-20100339
Gross Retail Tax
For the Years 2005, 2006, 2007**

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ISSUES

I. Sales Tax – Sales to Out-of-State Customers.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-39; IC § 6-2.5-5-15 (repealed 2004); IC § 6-8.1-5-1(c); [45 IAC 15-3-2](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 28S (February 2008); Sales Tax Information Bulletin 72 (June 2006); Sales Tax Information Bulletin 72 (July 2008).

Taxpayer protests the imposition of the sales tax on sales of recreational vehicles to out-of-state customers.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana retailer that sells new and pre-owned recreational vehicles ("RVs"). Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that, during 2005, 2006, and 2007 tax years, Taxpayer failed to collect and remit the sales tax on several RVs which Taxpayer sold to out-of-state customers and which were picked up at Taxpayer's Indiana location. The Department's audit assessed Taxpayer additional sales tax, interest, and penalty. Taxpayer protested the assessments. Taxpayer asked that the determination be made on information already in its file. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Sales to Out-of-State Customers.

DISCUSSION

After an audit, the Department assessed Taxpayer sales tax on the RVs which it sold to out-of-state customers during 2005, 2006, and 2007 where the out-of-state customers picked up the RVs in Indiana. Taxpayer protested stating that it made these out-of-state customers sign affidavits that they would pay the equivalent use tax in their home states when they registered their vehicles thus alleviating Taxpayer of the requirement to collect and remit sales tax to the Department.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Taxpayer, a dealer selling RVs, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

The law applying to sales to out-of-state purchasers where delivery was taken in Indiana changed during the years at issue. The Department's audit sets out these changes clearly noting that the exemption Taxpayer is claiming, as stated in the then IC § 6-2.5-5-15, was repealed as of July 1, 2004. The Department's audit then sets out the basis for its assessment of additional sales tax for various periods during the years at issue.

For sales from January 1, 2005 through June 30, 2005, Indiana dealers were required to collect sales tax on all retail transactions of RVs delivered in Indiana regardless of where the purchasers lived or where the vehicle was going to be titled and registered. During this period Taxpayer sold vehicles that were picked up at Taxpayer's Indiana location. Taxpayer usually required its customers to sign an affidavit stating they would pay the tax in their home state. While this would have satisfied the old requirements, an affidavit from a customer was no longer sufficient to exempt Taxpayer from collecting and remitting the sales tax. The Department's audit, nonetheless, gave Taxpayer credit where Taxpayer had a record that sales tax was paid in the home jurisdiction. The Department's audit assessed sales tax on all other transactions where no sales tax was paid and delivery was taken in Indiana.

Effective July 1, 2005 and until June 30, 2006, the purchase of a recreational vehicle or trailer (as defined by IC § 6-2.5-5-39) by an out-of-state customer which was to be registered and or titled outside Indiana was afforded an exemption in an amount that would cause the buyer to pay no more state sales tax than would have been due

if they had made the purchase in the state the vehicle was to be registered and/or titled. The Department's audit found that Taxpayer failed to collect sales tax at the applicable rate of the purchaser's home state on two sales, one to a California resident and one to an Arizona resident. Taxpayer was unable to obtain verification that sales tax was paid in the home state, therefore, the Department's audit assessed additional sales tax using either the foreign jurisdiction's rate or Indiana's, whichever was lower.

Effective July 1, 2006, IC § 6-2.5-5-39, as amended by P.L.92-2006, Sec.1, provides an exemption for sales of motor homes, RVs, and travel trailers to residents of forty-two states and the District of Columbia because these jurisdictions had reciprocating agreements with Indiana. For the period July 1, 2006 through June 30, 2007, Taxpayer was obligated to collect Indiana sales tax in its sales to residents of California, Massachusetts, North Carolina, Florida, Michigan, South Carolina, Maine, Mississippi, Canada, and Mexico only because these jurisdictions did not have reciprocal agreements with Indiana. The Department's audit found that Taxpayer had made sales to purchasers from these latter jurisdictions without collecting sales tax. The Department's audit, therefore made adjustments for those transactions where delivery was taken in Indiana. The Department's audit did not give credit for those transactions Taxpayer was able to verify sales tax had been paid in the home jurisdiction this time, because there was no reciprocal agreement in these jurisdictions.

IC § 6-2.5-5-39, in relevant part, states:

(b) As used in this section, "recreational vehicle" means a vehicle with or without motive power equipped exclusively for living quarters for persons traveling upon the highways. The term includes a travel trailer, a motor home, a truck camper with a floor and facilities enabling it to be used as a dwelling, and a fifth wheel trailer.

(c) A transaction involving a cargo trailer or a recreational vehicle is exempt from the state gross retail tax if:

- (1) the purchaser is a nonresident;
- (2) upon receiving delivery of the cargo trailer or recreational vehicle, the person transports it within thirty (30) days to a destination outside Indiana;
- (3) the cargo trailer or recreational vehicle will be titled or registered for use in another state or country;
- (4) the cargo trailer or recreational vehicle will not be titled or registered for use in Indiana; and
- (5) the cargo trailer or recreational vehicle will be titled or registered in a state or country that provides an exemption from sales, use, or similar taxes imposed on a cargo trailer or recreational vehicle that is purchased in that state or country by an Indiana resident and will be titled or registered in Indiana.

A transaction involving a cargo trailer or recreational vehicle that does not meet the requirements of subdivision (5) is not exempt from the state gross retail tax.

(d) A purchaser must claim an exemption under this section by submitting to the retail merchant an affidavit stating the purchaser's intent to:

- (1) transport the cargo trailer or recreational vehicle to a destination outside Indiana within thirty (30) days after delivery; and
- (2) title or register the cargo trailer or recreational vehicle for use in another state or country.

The department shall prescribe the form of the affidavit, which must include an affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true. The affidavit must identify the state or country in which the cargo trailer or recreational vehicle will be titled or registered.

(e) The department shall provide the information necessary to determine a purchaser's eligibility for an exemption claimed under this section to retail merchants in the business of selling cargo trailers or recreational vehicles.

(Emphasis added.)

Sales Tax Information Bulletin 72 (June 2006), 20060802 Ind. Reg. 045060211NRA, listed states and countries which meet the statutory requirements as well as states and countries which are subject to Indiana sales tax. Subsequently, the Department updated the Sales Tax Information Bulletin 72 (July 2008), 20080827 Ind. Reg. 045080663NRA, which, in relevant part, states:

III. EXEMPTION FROM THE SALES TAX

Effective July 1, 2006, sales of recreational vehicles and cargo trailers by Indiana dealers destined for out-of-state registration will be exempt from the Indiana sales tax if the state where the recreational vehicle or cargo trailer is going to be registered provides a similar exemption for an Indiana resident making a purchase in that state. This exemption also applies to states that do not impose a sales tax. Forty-one states listed below, plus the District of Columbia provide a drive-out exemption, provide reciprocity, or have no sales tax.

Alabama	Alaska	Arkansas
Colorado	Connecticut	Delaware
Dist. of Columbia	Georgia	Idaho
Illinois	Indiana	Iowa
Kansas	Kentucky*	Louisiana
Maine*	Maryland	Minnesota

Missouri	Montana	Nebraska
Nevada	New Hampshire	New Jersey
New Mexico	New York	North Dakota
Ohio	Oklahoma	Oregon
Pennsylvania	Rhode Island*	South Dakota
Tennessee	Texas	Utah
Vermont	Virginia	Washington
West Virginia	Wisconsin	Wyoming

*Only applies to recreational vehicles

IV. STATES WITH NO EXEMPTION

There are nine states plus Canada, Mexico, and all other foreign countries that do not provide an exemption for vehicles to be registered in Indiana. Because of this, purchases 1) made from Indiana dealers and 2) to be registered in one of the following will be required to pay Indiana sales tax at the time of purchase.

Arizona	California	Florida
Hawaii	Massachusetts	Michigan
Mississippi	North Carolina	South Carolina

V. PROOF OF EXEMPTION

A purchaser who is purchasing a recreational vehicle or cargo trailer in Indiana to be registered in another state must complete an affidavit of exemption (Form ST137RV) when he purchases the recreational vehicle or cargo trailer. The purchaser certifies under penalty of perjury that he is not an Indiana resident and will remove the recreational vehicle or cargo trailer within 30 days to be registered in one of the states listed in the exemption from sales tax category.

The original signed ST137RV form must be mailed to the Department of Revenue by the Indiana retail merchant within 30 days of the purchase invoice date. The Department of Revenue will notify the purchaser's state of residence as indicated on the ST-137RV form. The selling dealer must maintain a copy of the ST-137RV in order to document non-collection of the Indiana sales tax.

(Emphasis is original.)

Sales Tax Information Bulletin 28S (February 2008), 20080130 Ind. Reg. 045080050NRA, in pertinent part, also states:

INTRODUCTION

General Application of Sales Tax:

Effective July 1, 2004 ALL SALES of motor vehicles and trailers purchased in Indiana are subject to Indiana sales tax. This includes sales where the purchaser intends to immediately register, license or title for use in another state.

Recreational Vehicles and Trailers Only:

Effective July 1, 2005 a partial to a full exemption may be applicable to the purchase of a recreational vehicle (RV) or a cargo trailer (as defined by [IC 6-2.5-5-39](#)) pertaining to the purchase by a NONRESIDENT only. Additional information on this exemption is available on the Department's Web site at <http://www.in.gov/dor/3786.htm>

Recreational Vehicles and Trailers Only:

Effective July 1, 2006 a full exemption is applicable to the purchase of a recreational vehicle (RV) or a cargo trailer by a NONRESIDENT if the purchaser affirms the purchase will be registered/titled within 60 days in a reciprocal state or country. A reciprocal state is one that will allow an exemption to an Indiana resident who purchases a recreational vehicle or trailer to be registered/titled in Indiana. Dealers must collect the Indiana sales tax on sales to a nonresident of Indiana if registering or titling in one of the following non-reciprocal states/countries.

California	North Carolina
Florida	South Carolina
Maine	Canada
Massachusetts	Mexico
Michigan	All Other Countries
Mississippi	

Based on the above, the Department's audit correctly assessed Taxpayer additional sales tax for those sales to out-of-state customers where delivery was taken in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.**DISCUSSION**

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

While Taxpayer failed to follow the requirements of the law, the frequent changes in the application of the law during the periods at issue establish reasonable cause for Taxpayer's failure to collect and remit sales tax during this period.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is sustained.

SUMMARY

Taxpayer is respectfully denied on its protest that it need not have collected sales tax on its sales to out-of-state purchasers where the purchaser took delivery in Indiana.

Taxpayer is sustained on its protest of the imposition of negligence penalty.

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